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No. 85-67

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

WILLIAM THOMAS ROBINSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner was entitled to a severance because of the introduction of evidence against a co-defendant showing that the co-defendant had been involved in prior drug transactions.

2. Whether the special parole provision of 21 U.S.C. 841 is unconstitutional because it delegates to the sentencing judge the legislative authority to determine the maximum penalty.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. B1-B31) is reported at 759 F.2d 20 (Table).

JURISDICTION

The judgment of the court of appeals was entered on March 27, 1985. A petition for rehearing was denied on April 26, 1985 (Pet. App. A1-A3). The petition for a writ of certiorari was filed on June 19, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted of conspiracy to distribute and possession with intent to distribute dilaudid, in violation of 21 U.S.C. 846 and 841(a)(1) (Counts one, two), and two counts of using a telephone to facilitate the distribution, in violation of 21 U.S.C. 843(b) (Counts three, four). He was sentenced to concurrent terms of 15 years' imprisonment on Counts one and two and four years' imprisonment on Counts three and four, to be followed by a special parole term of three years.[1] The court of appeals affirmed (Pet. App. B1-B31).

1. The evidence at trial, the sufficiency of which is not in dispute, is summarized in the opinion of the court of appeals (Pet. App. B3-B8). In-court testimony and recordings of telephone conversations intercepted pursuant to a court-authorized wiretap showed that petitioner and co-defendant Williams, operating out of Texas, conspired with co-defendant Rogers, who worked and resided in Oklahoma, to distribute dilaudid tablets, a Schedule II controlled substance. In particular, telephone calls between petitioner and Williams' wife, arranging for a meeting to take place in Oklahoma between the three defendants, led to the issuance of a search warrant executed upon petitioner and Williams at the Dallas/Fort

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[1] Co-defendants Jerry Dwain Williams and Avery Rogers, tried jointly with petitioner, were similarly convicted of conspiracy, possession with intent to distribute dilaudid, and use of the telephone to facilitate the narcotics distribution. Their convictions were also affirmed by the court of appeals. A petition for a writ of certiorari (No. 84-6904) filed by co-defendant Williams was denied by this Court on October 7, 1985.

Worth Airport as they were leaving for Oklahoma. At that time, a search of petitioner's boots uncovered two bottles of dilaudid, containing approximately 1,000 pills. Petitioner and Williams were arrested at that time, and Rogers was later arrested in Oklahoma.

2. A government witness, Terry McCuistion, testified concerning his cocaine and marijuana dealings with co-defendant Williams in the months immediately preceding Williams' arrest (III Tr. 118-122). The court repeatedly gave comprehensive limiting instructions to the jury that most of McCuistion's testimony was relevant only to defendant Williams and explained its purpose under Fed. R. Evid. 404(b) (see III Tr. 115-116, 122-123, 124).[2] One statement made by Williams to McCuistion was admitted against all defendants: McCuistion testified that Williams said, one or two days before Williams' arrest, that he and petitioner were going to meet at the Dallas/Fort Worth Airport and then deliver dilaudid pills to Rogers in Tulsa, Oklahoma; Williams told McCuistion that he planned to use his profits from the sale of dilaudid to pay off a debt to petitioner for some cocaine so that he could get more cocaine "moving into Amarillo" (Pet. App. B8-B9; III Tr. 126-127).

3. The court of appeals rejected petitioner's contention that he should have been granted a severance because of McCuistion's testimony. The court found that the jury understood that most of McCuistion's

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[2] The court of appeals rejected Williams' argument that this evidence should not have been admitted against him. The court held that the evidence was properly introduced to counter Williams' defense that he was travelling to Oklahoma to sell race horses, not dilaudid. Pet. App. B8-B12.

testimony was admitted against Williams only. Pet. App. B13-B14.

ARGUMENT

1. Relying on *Bruton* v. *United States*, 391 U.S. 123 (1968), petitioner argues that his motion to sever should have been granted because he was prejudiced by McCuistion's testimony. Petitioner does not clearly distinguish between the evidence that was admitted against Williams alone and the evidence that was admitted against all defendants. It is clear, however, that no error was committed in refusing to grant the severance.

a. Petitioner appears to argue that a severance should have been granted because he was implicated in Williams' cocaine dealing by McCuistion's testimony. Contrary to petitioner's argument, *Bruton* is not applicable in such a case. In *Bruton* the co-defendant confessed that he and Bruton had committed the robbery for which they were on trial, and the confession was introduced at trial with instructions directing the jury to limit its consideration of the confession to use against the co-defendant. The Court concluded that in such a case, where the statement was powerfully incriminating with respect to the precise issue that was the subject of the trial, it could not be assumed that the limiting instructions were effective. This case is quite different because the evidence of Williams' prior cocaine dealings did not implicate petitioner in the crime for which he was charged and convicted and for the most part did not even mention petitioner. There is no reason to believe that the jury did not follow the district court's limiting instructions, as the court of appeals concluded.

Petitioner suggests (Pet. 18) that the initial instructions limiting consideration of the evidence of prior cocaine dealings between McCuistion and Williams to Williams alone were contradicted by the court's subsequent instruction that one part of McCuistion's testimony—Williams' statement that he and petitioner were going to deliver dilaudid tablets to Rogers in Oklahoma—was being admitted against all defendants (III Tr. 126). But the instruction stating that that one statement was admitted against all defendants directly followed the prosecutor's specific reference to "the statement * * * which we would offer in admission to all the defendants" and immediately preceded the statement that Williams told McCuistion that he and petitioner were going to deliver dilaudid tablets to Rogers in Oklahoma (*ibid.*). We fail to see how the district court could have instructed the jury more clearly. Additionally, petitioner did not object below that the second instruction was contradictory, confusing, or harmful to his defense.

b. If petitioner is complaining about admission of the one statement by Williams that was admitted against all defendants, his argument has no basis. That statement was admitted under the co-conspirator exception to the hearsay rule. As the courts of appeals have uniformly held, *Bruton* is inapplicable to statements admissible under that exception. See *United States* v. *Norton*, 755 F.2d 1428, 1431 (11th Cir. 1985); *United States* v. *Carter*, 721 F.2d 1514, 1535 n.30 (11th Cir. 1984), cert. denied, No. 83-1743 (Oct. 1, 1984); *United States* v. *McCown*, 711 F.2d 1441, 1448 (9th Cir. 1983); *United States* v. *Roberts*, 583 F.2d 1173, 1176-1177 (10th Cir. 1978), cert. denied, 439 U.S. 1080 (1979); *United States* v. *Arch-*

bold-Newball, 554 F.2d 665, 667 (5th Cir.), cert. denied, 434 U.S. 1000 (1977).[3]

Moreover, any error in the admission of Williams' statement was assuredly harmless. Intercepted telephone calls established that petitioner and Williams would fly from Dallas to Tulsa to deliver a substantial quantity of pills. In fact when petitioner and Williams were arrested at the airport, Williams was in possession of airline tickets for the two men to Tulsa, petitioner was in possession of the 1,000 tablets hidden in his boots, and co-defendant Rogers was arrested at the Tulsa airport awaiting his co-conspirators' arrival on the flight from Dallas (Pet. App. B16). Williams' out-of-court statement to McCuistion merely described plans that, as other evidence overwhelmingly established, were followed to the letter. Under these circumstances, petitioner's alleged inability to cross-examine Williams was plainly harmless beyond a reasonable doubt. See *Schneble* v. *Florida*, 405 U.S. 427 (1972); *Harrington* v. *California*, 395 U.S. 250, 254 (1969); *United States* v. *Tashjian*, 660 F.2d 829, 839 n.18 (1st Cir.), cert. denied,

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[3] The court of appeals' equivocation notwithstanding (see Pet. App. B15-B16), Williams' statement that was admitted against all defendants was clearly in furtherance of the conspiracy. The evidence showed that petitioner, his two co-defendants, and McCuistion were joined in a conspiracy to distribute narcotics; that Williams and McCuistion were in financial difficulty; that Williams told McCuistion about the plans to sell dilaudid to Rogers in Tulsa to pay off their narcotics debt and resume the flow of narcotics into Amarillo; and that after learning of Williams' and petitioner's arrest at the Dallas/Fort Worth Airport, McCuistion telephoned Rogers to inform him (III Tr. 116-129). Given the relationship of the statement to the overall conspiracy, the district court correctly found it to be in furtherance of the conspiratorial scheme.

454 U.S. 1102 (1981); *United States* v. *Halliday*, 658 F.2d 1103, 1105 (6th Cir.), cert. denied, 454 U.S. 1127 (1981).

2. Petitioner's claim (Pet. 21-24) that the special parole provision of 21 U.S.C. 841 [4] is unconstitutional because it delegates to the judiciary the legislative function of setting the range of potential punishment is frivolous and has been uniformly rejected by the courts of appeals.[5] As the Seventh Circuit explained, while Section 841 "does not expressly specify the maximum parole term, * * * it can only be read as authorizing a lifetime maximum parole term." *United States* v. *Bridges*, 760 F.2d 151, 153 (1985) (citing cases).[6] The contrary decision relied upon by petitioner (*United States* v. *Tebha*, 578 F. Supp.

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[4] Section 841(b)(1)(A) provides, in pertinent part, that "[a]ny sentence imposing a term of imprisonment under this paragraph shall * * * impose a special parole term of at least 3 years in addition to such term of imprisonment."

[5] See, *e.g.*, *United States* v. *Arellanes*, 767 F.2d 1353, 1358-1359 (9th Cir. 1985) (citing cases); *United States* v. *Carcaise*, 763 F.2d 1328, 1334-1335 (11th Cir. 1985); *Walberg* v. *United States*, 763 F.2d 143, 147-149 (2d Cir. 1985); *Yates* v. *United States*, 753 F.2d 70, 71 (8th Cir. 1985), cert. denied, No. 84-6382 (Apr. 15, 1985); *United States* v. *Hernandez*, 750 F.2d 1256, 1260 (5th Cir. 1985); *United States* v. *Walden*, 578 F.2d 966, 972 (3d Cir. 1978), cert. denied, 444 U.S. 849 (1979); *United States* v. *Jones*, 540 F.2d 465, 468 (10th Cir. 1976), cert. denied, 429 U.S. 1101 (1977).

[6] In any event, the statute clearly provides for the three-year special parole term petitioner received. That is the *minimum* term under Section 841(b)(1)(A), and petitioner has no standing to complain about the manner in which the statute authorizes imposition of a greater special parole term than he received. Cf. *United States* v. *Raines*, 362 U.S. 17 (1960).

1398 (N.D. Calif. 1984)) has itself been reversed recently by the court of appeals. *United States* v. *Tebha*, 770 F.2d 1454 (9th Cir. 1985); see also *United States* v. *Arellanes*, 767 F.2d 1353, 1358-1359 (9th Cir. 1985). Thus, there is no conflict on this issue and there is no warrant for review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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